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Supreme Court, U.S.
FILED
JUN 10 2004
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No. 03-1427

IN THE

Supreme Court of the United States

THE EUROPEAN COMMUNITY, *et al.*,

Petitioners,

v.

RJR NABISCO, INC., *et al.*,

Respondents.

DEPARTMENTS OF THE REPUBLIC OF COLOMBIA,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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PRELIMINARY STATEMENT

Counsel "have a continuing duty to inform the Court of any development which may conceivably affect an outcome." *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring); *see also Board of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (*per curiam*).

On May 11, 2004, the United States signed the Framework Convention on Tobacco Control, WHA56.1 (May 21, 2003) ("FCTC"), and thereby expressly confirmed its strong policy favoring cooperation with foreign States in proceedings brought to combat cigarette smuggling. This is a relevant and important development, that occurred after the filing of the instant petition, that Petitioners believe should be brought to the Court's attention under the authorities cited above.

THE EXECUTIVE BRANCH HAS EXPRESSLY CONFIRMED ITS STRONG POLICY FAVORING COOPERATION WITH FOREIGN STATES IN CIGARETTE SMUGGLING CASES

The Court of Appeals' decision was predicated on the "perception" that there was no "evidence" that the Executive Branch favors "assistance" to foreign States in cigarette smuggling cases. App. 14a, 25a. The recent action of the Executive Branch renders this perception incorrect.

On May 11, 2004, the United States signed the FCTC, the first-ever global public health treaty. The FCTC embraces the policy that "cooperative action is necessary to eliminate all forms of illicit trade in cigarettes and other tobacco products, including smuggling." FCTC, Preamble. To this

end, the FCTC contains strong and unequivocal provisions, promoted by the United States, which require that all parties "shall" act to "promote cooperation" on an "international" and "intergovernmental" basis in "proceedings" brought to eliminate "illicit trade in tobacco products." FCTC, art. 15(6).[1] The United States has publicly confirmed that "the treaty contains a strong U.S.-drafted provision against tobacco smuggling" which is designed to "prevent illicit trade in tobacco." Department of Health & Human Services ("HHS") Press Release, May 11, 2004.[2]

The FCTC is an authoritative expression of Executive Branch policy that should be credited by the courts. It provides compelling new evidence — unavailable to the Court of Appeals — that the Executive Branch expressly favors broad "cooperation" with foreign States in connection with "proceedings" initiated by foreign States to eliminate cigarette smuggling. Had this express policy pronouncement been available to the Court of Appeals, in addition to the evidence already submitted by Petitioners, it should have altered the Court of Appeals' perception that there was no "evidence" that the Executive Branch favors "assistance" to foreign States in cigarette smuggling cases. App. 14a.

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1. Other provisions of the FCTC also underscore the overarching policy of cross-border cooperation and comity in the general area of tobacco control. *See, e.g.*, FCTC, art. 19(3) (calling for reciprocal "assistance in legal proceedings relating to civil and criminal liability consistent with this Convention"); art. 19(4) (preserving the reciprocal right of access to the courts).

2. The HHS press release is a public document of which this Court may take judicial notice. It is publicly available at the official HHS website —(*http://www.hhs.gov/news/press/2004pres/20040511.html*) and, for the sake of convenience, is reproduced hereto as an appendix.

Application of the judge-made revenue rule to bar Petitioners' lawsuit would directly and unjustifiably defeat the object and purpose of the FCTC. As a signatory, the United States "is obliged to refrain from acts which would defeat the object and purpose" of the FCTC. United Nations Convention on the Law of Treaties, S. Exec. Doc. L, 92d Cong., 1st Sess. (1971), art. 18(a) (signed for the United States on April 24, 1970) ("Vienna Convention").[3] The object and purpose of Article 15 of the FCTC is to promote, foster and enhance reciprocal cooperation in connection with proceedings brought by foreign States to combat cigarette smuggling. The barring of such assistance on the basis of the revenue rule would be inconsistent with this policy and would undermine a key provision of the FCTC promoted by the United States Government.

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3. The U.S. Department of State recognizes the Vienna Convention as "the authoritative guide to current treaty law and practice." *See, e.g.*, Vienna Convention on the Law of Treaties, S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971); *accord Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir.), *cert. denied*, 534 U.S. 891 (2001) ("the United States 'recognizes the Vienna Convention as a codification of customary international law'") (citation omitted). The United States has recently reaffirmed this view. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Republic of Austria v. Altman*, at 17 n.11 (No. 03-13) (Nov. 2003).

CONCLUSION

In light of the FCTC, the instant petition should be granted, the judgment below should be vacated, and the case should be remanded to allow the Court of Appeals, in the first instance, to revisit its judgment that there is no evidence that the Executive Branch favors assistance to foreign States in cigarette smuggling cases.

Alternatively, the petition should be granted, and the case should be accorded plenary treatment.

Respectfully submitted,

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APPENDIX

APPENDIX — NEWS RELEASE

UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES

NEWS RELEASE

FOR IMMEDIATE RELEASE
Tuesday, May 11, 2004

Contact: HHS Press Office
(202) 690-6343

United States Signs Tobacco Control Treaty

NEW YORK — On behalf of the United States, HHS Secretary Tommy G. Thompson signed the Framework Convention on Tobacco Control (FCTC) on Monday at the United Nations. The FCTC is the first-ever global public health treaty negotiated under the auspices of the World Health Organization (WHO).

The treaty serves as an important basis for advancing public health worldwide. It encourages other nations to establish standards similar to the ones set for tobacco prevention and control domestically in the United States. For example, the treaty contains a strong U.S.-drafted provision against tobacco smuggling, which could help prevent illicit trade in tobacco.

"The United States has long been a world leader in anti-smoking efforts," Secretary Thompson said. "We have committed more resources than any other country to the research, development and evaluation of smoking control and

cessation programs, both at home and abroad. President Bush and I look forward to working with the WHO and other member nations to implement this agreement."

Secretary Thompson noted that the United States is making strides in reducing death and disease caused by tobacco as well as in diminishing use, especially among children. Youth smoking rates have dropped significantly in this country among minors — from 18.9 percent in the mid-1990s to 13 percent in 2002. However, tobacco-related illness remains the leading preventable cause of death among adult Americans.

The United States, with HHS as the lead agency, participated actively throughout the drafting process and negotiations to help achieve a strong and effective instrument for global tobacco control. The World Health Assembly adopted the FCTC in May 2003. The United States becomes the 108th nation to sign this treaty.

The FCTC is intended to provide for basic tobacco control measures to be implemented by all parties through domestic law. The objective of the FCTC is to protect "present and future generations from devastating health, social, environmental and economic consequences" of tobacco use and to reduce the prevalence of tobacco use and exposure to tobacco smoke.

The demand for and the supply of tobacco is addressed through various means, including smoking prevention and cessation, health warnings on packaging, restrictions on tobacco advertising and sponsorship in accordance with each

signatory nation's domestic law and constitution, and measures to combat illicit trade. Promoting public awareness of the adverse health effects of tobacco use is also a key element of the treaty. Parties must support measures to protect against exposure to tobacco smoke in public venues, and prohibit cigarette sales to minors.

The FCTC is designed to reduce the demand for and the supply of tobacco, and promoting public awareness of the adverse health effects of tobacco use is a key element of the treaty. Once the FCTC takes effect, treaty requires partners to:

- Promote public awareness of tobacco control and promote smoking prevention and cessation.

- Include health warnings on packaging and ensure that tobacco product packaging and labeling is not false or misleading, or could create the false impression that the product is less harmful than other tobacco products.

- Have restrictions on tobacco advertising and sponsorship in accordance with each nation's domestic law and constitution.

- Have measures to combat illicit trade to prevent tobacco smuggling, a provision drafted by the United States.

- Prohibit tobacco product sales to minors.

Appendix

The treaty is open for signature until June 29. The treaty will take effect after 40 nations have ratified it; nine nations have ratified the FCTC so far. The next step for the treaty in the United States is submission to the Senate, following completion of further interagency review of the treaty.

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Note: All HHS press releases, fact sheets and other press materials are available at *http://www.hhs.gov/news.*

Last Revised: May 11, 2004

U.S. Department of Health & Human Services • 200 Independence Avenue, S.W. • Washington, D.C. 20201